September 2021

Decision in CPLR Article 78 proceedings - Patterson, Derrick (2016-06-07)

Matter of Patterson v Stanford
2016 NY Slip Op 31033(U)
June 7, 2016
Supreme Court, Franklin County
Docket Number: 2016-0017
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
DERRICK PATTERSON, #12-A-4236,
Petitioner,

DECISION AND JUDGMENT
RJI #16-1-2016-0014.05
INDEX #2016-0017
ORI #NY016015J

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

TINA M. STANFORD, Chairwoman,
NYS Board of Parole,
Respondent.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Derrick Patterson, verified on November 19, 2015 and filed in the Franklin County Clerk's Office on January 12, 2016. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the March 2015 determination denying his discretionary parole release and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on January 15, 2016 and has received and reviewed Respondent's Answer and Return verified on March 9, 2016, including confidential Exhibit C. No Reply has been received from Petitioner.

On September 6, 2012, Petitioner was sentenced by the Queens County Supreme Court, as a persistent felony offender, to an indeterminate term of three and one-half to seven (3½ - 7) years upon the conviction of Robbery 3rd Degree. He was received into the custody of the Department of Corrections and Community Supervision (hereinafter referred to as "DOCCS") on September 20, 2012 and made his initial appearance before a Parole Board on March 31, 2015. Following that appearance, Petitioner was denied discretionary parole release and it was directed that he be held for an additional 24 months. The parole denial determination reads as follows:

> "Denied hold 24 months. Next appearance, 3/17.
>
> Despite the Earned Eligibility Certificate, after a review of the record, interview, and deliberation, the panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and that your release would be incompatible with the welfare and safety of society. Parole is denied.
>
> Required statutory factors have been considered, together with your institutional adjustment including discipline and program participation, your risk and needs assessment, and your needs for successful reentry into the community. Your release plans and any letters of reasonable assurance are also noted. More compelling, however, are the following:
>
> Your serious IO of Robbery 3rd degree together with your lengthy history of criminal conduct while in the community. The IO involved you assaulting a female victim and stealing her handbag.
>
> The IO also represents a continuation of larcenous and violent behaviors among others that are a concern to this panel.
>
> Your positive programming is noted as is your disciplinary record which can be improved.
>
> Nonetheless, previous terms of incarceration and community supervision have failed to prevent you from committing more crimes.
>
> This is your fifth state term. You have failed while on parole multiple times previously and were still on parole at the time of the IO.
>
> Therefore, based on all required factors and the file considered, discretionary release at this time is not appropriate."

The document perfecting Petitioner's administrative appeal from the March 2015 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on April 29, 2015. On or about September 9, 2015, the parole denial determination was affirmed. This proceeding ensued.

Executive Law §259-i(c)(A), as amended by L 2011, ch 62, part C, subpart A, §§38-f and 38-f-1, effective March 31, 2011, provides in relevant part, as follows:

> "Discretionary release on parole shall not be granted merely as a

> reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; ... (iii) release plans including community resources, employment, education and training and support services available to the inmate; ... (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5)) unless there had been a showing of irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470; *Hamilton v. New York State Division of Parole*, 119 AD3d 1268; *Vasquez v. Dennison*, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. Unless the Petitioner makes a "convincing demonstration to the contrary," the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Jackson v. Evans*, 118 AD3d 701, *Nankervis v. Dennison*, 30 AD3d 521 and *Zane v. New York State Division of Parole*, 231 AD2d 848.

The Petition focuses upon the argument that the Parole Board failed to adequately consider/properly weigh all of the required statutory factors and instead relied excessively on the nature of the crimes underlying Petitioner's incarceration as well as his prior criminal record. In this regard, Petitioner specifically alleges as follows:

> "In the present case, Mr. Patterson was convicted of a felony. He had a prior felony record. He has had only a minor record of disciplinary violations while incarcerated. His prior record, however, is outweighed by his significant accomplishments while incarcerated and his positive COMPASS (*sic*) report. He demonstrated concretet (*sic*) plans upon release.
>
> In this case as in the King case, the board failed to consider the statutory factors in a fair manner. First, it spent the vast majority of the hearing emphasizing the details of Mr. Patterson's crime and his prior criminal record. Second, it is readily apparent that the board disregarded or willfully ignored all of the progress Mr. Patterson has made while incarcerated. This is a clear addiction (sic) of their statutory responsibility. Third, the board failed to note Mr. Patterson's release plans or ask questions to the affect of his release plans." (Petition, ¶18-19).

To the extent Petitioner purports to rely on *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, the Court finds such reliance to be misplaced. In *King*, the Appellate Division, First Department, not only determined that the Parole Board improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed "to consider and fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative achievements and would appear to strongly militate in factor of granting parole." *Id.* at 433. The appellate-level court in *King* went on to note that the only statutory criterion referenced by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police office during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince ... the Legislature has determined that a murder conviction per se should not preclude parole,

there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *Id.* at 433.

This Court (Supreme Court, Franklin County) first notes that Mr. King had no prior contacts with the law. *Id.* at 426. Petitioner, on the other hand, previously served four (4) separate terms of incarceration with DOCCS and, in fact, committed in the instant offense while on parole release. In addition, although the *King* court did not reference Mr. King's disciplinary record, it characterized his overall prison record as "exemplary." *Id.* at 425. The parole denial determination in *King*, as quoted by the Appellate Division, First Department, described Mr. King's institutional adjustment as "excellent." *Id.* at 430. In the case at bar, however, Petitioner's prison disciplinary record, as alluded to in the March 2015 parole denial determination, includes three Tier II infractions and one Tier III infraction for fighting. It is clear, therefore, that the March 2015 parole denial determination was not based exclusively on the nature of the crimes underlying Petitioner's incarceration but, rather, was also based on his record of prior violent felony offenses and his less than stellar prison disciplinary record despite the short period of time he had been incarcerated on the instant offense.

In any event, in July of 2014, the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See, Hamilton v. New York State Division of Parole*, 119 AD3d 1268. In *Hamilton*, it was noted that the Third Department "has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is

'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans*, 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (20144) [internal quotation marks and citations omitted]'". *Id.* at 1271 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the string of cites as follows: "... but *see Matter of King v. New York State Div. of Parole*, 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d 788[1](1994) [a First Department case holding, in conflict with our precedent, that the Board [of Parole] may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime." 119 AD3d at 1272.

Petitioner's above arguments notwithstanding, a Parole Board need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Montane v. Evans*, 116 AD3d 197; *see also Valentino v Evans*, 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination

> ". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory

[1] The Court of Appeals in *King* only referenced the fact that "one of the [Parole] Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

> guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior (internal citations omitted)." *Comfort v. New York State Division of Parole*, 68 AD3d 1295, 1296.

In the case at bar, reviews of the Parole Board Report and transcript of Petitioner's March 31, 2015 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including Petitioner's educational and therapeutic programming records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record and letters of support regarding release, as well as information with respect to the circumstances of the crimes underlying his incarceration and prior criminal record. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board denied the Petitioner an opportunity to answer questions or provide insight into how and why he believed that he would be a good candidate for release. Indeed, the Petitioner was forthright when he indicated that he understood that his use of narcotics in the past led to his criminal behavior despite having completed the Alcohol and Substance Abuse Treatment program in State Prison at least four times previously. Petitioner indicated that he had previously failed to apply what he had learned while incarcerated. In addition, Petitioner stated that his last offense occurred when he was 49 years of age and he was 52 at the time of the initial appearance before the Parole Board.

In view of the foregoing, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole*, 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory

factors were considered, and given the narrow scope of judicial review of the discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying Petitioner's incarceration and his prior criminal record (including four previous state incarcerations for felonies and that the instant offense occurred while he was on parole for a previous crime). *See Neal v. Stanford,* 131 AD3d 1320 and *Confoy v. New York State Division of Parole*, 173 AD2d 1014.

Citing *Thwaites v New York State Board of Parole*, 34 Misc 3d 694, Petitioner next argues that the Parole Board erred in failing to apply the amended version of Executive Law §259-c(4) when it considered him for discretionary parole release and, ultimately, denied such release. Notwithstanding the fact that the 2011 amendment to Executive Law §259-c(4) was designated by the legislature as taking effect on September 30, 2011, the *Thwaites* court found that the amendment had to be applied retroactively to Mr. Thwaites' March 16, 2010 parole denial determination. In the matter at bar, the Petitioner's initial appearance before the Parole Board occurred post-amendment of Executive Law §259-c(4). The guidelines directed therein are set forth in 9 NYCRR §8002.3, as amended effective July 30, 2014. Although the Petitioner asserts that he will have served over five (5) years of the 3 ½ to 7 year sentence before he appears for a parole hearing again, the Parole Board appears to have followed the guidelines as they rely, in part, upon the Petitioner's extensive criminal history as well as the nature of the instant offense.

The Court also finds that the March 2015 parole denial determination is sufficiently

detailed to inform Petitioner of the reasons underlying the denial and to facilitate judicial review thereof. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295 and *Ek v. Travis*, 20 AD3d 667, *lv dismissed* 5 NY3d 862.

Petitioner asserts that the Parole Board failed to consider the COMPAS instrument. In the case at bar, there is no doubt that a COMPAS risk and needs assessment instrument was prepared in conjunction with the discretionary parole release consideration process. The COMPAS instrument is part of the record in this proceeding and was specifically discussed during the course of Petitioner's March 31, 2015 parole interview, with one of the Commissioners noting that the COMPAS instrument "noted under the criminal involvement part it said you were a high risk.[2] History of violence was high; prison misconduct was high." Petitioner's reliance upon the categories wherein he was found to have a low risk, i.e. risk of felony violence, arrest risk and abscond risk, is misplaced in consideration of the entire risk instrument.

Although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determination (*see Linares v. Evans*, 112 AD3d 1056, *aff'd* 26 NY3d 1012, *Malerba v. Evans*, 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the facts set forth in

[2] The actual COMPAS instrument indicated that the score for criminal involvement to be "medium". It is further noted, however, that the instrument noted Petitioner's likelihood of reentry substance abuse to be "highly probable."

Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to "assist members of the state board of parole in determining which inmates may be released to parole supervision." Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not Petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound to consider only by the favorable quantified results of the COMPAS assessment. The Parole Board clearly considered the COMPAS results in conjunction with its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A) including, as here, the serious nature of the crimes underlying Petitioner's incarceration, his prior record of violent felony offenses and his prison disciplinary record. *See Rivera v. New York State Division of Parole*, 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

The Petitioner asserts that the Parole Board's determination of a 24 month hold was excessive insofar as the Petitioner will have served over five (5) years of his 3 ½ to 7 year sentence before he will be eligible for parole review. In light of the foregoing factors discussed relative to the Petitioner's previous criminal history, including the instant offense occurring while he was on parole release for a previous felony sentence, the Board's imposition of a 24 month hold is not unduly excessive. *See Shark v. New York State Division of Parole*, 110 AD3d 1134, 1135, *lv dismissed* 23 NY3d 933; *see also Smith*

v. New York State Division of Parole, 81 AD3d 1026.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: June 7, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice